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In the

Supreme Court of the United States

October Term, 1996

IN THE MATTER OF JOSEPH F. GAZZA,
Petitioner,

v.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
Respondent.

Petition for Writ of Certiorari
to the Court of Appeals
for the State of New York

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

May the government avoid liability under the Takings Clause for a taking of private property because the regulations prohibiting all reasonable economically beneficial use of the property were adopted before the property was acquired by the aggrieved owner?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this case.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*,[2] and *Suitum v. Tahoe Regional Planning Agency*.[3] PLF attorneys also represent petitioners in two closely related cases, *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*[4] and *Kim v. City of New York*.[5] PLF also participated as amicus curiae in *Agins v. City of Tiburon*,[6] *Keystone Bituminous Coal*

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] 483 U.S. 825 (1987).

[3] __ U.S.L.W. __ (May 27, 1997), *vacating and remanding*, 80 F. 3d 359 (9th Cir. 1996).

[4] Appeal docketed, No. 96-1880 (May 28, 1997).

[5] Appeal docketed, No. 96-1794 (May 19, 1997).

[6] 447 U.S. 255 (1980).

Association v. DeBenedictis,[7] *Hodel v. Irving*,[8] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[9] *Lucas v. South Carolina Coastal Council*,[10] *Dolan v. City of Tigard*,[11] and *Babbitt v. Youpee*.[12]

Consent to the filing of this brief has been granted by counsel for petitioner and respondent and has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

In 1989, Joseph Gazza purchased a 43,000 square foot parcel in a neighborhood zoned exclusively for single-family residences. Appendix to Petition for Writ of Certiorari (Appendix) at 26a. He wished to build a home similar to those in the neighborhood. His lot was inventoried as containing tidal wetlands by the New York State Department of Environmental Conservation. *Id.* Mr. Gazza intended to build his home on the upland, dry portion of his land. Petition at 6. His house could be so constructed under local regulations. However, Mr. Gazza could not build his home unless he received a variance from the state's requirements establishing setbacks between the tidal wetland boundary and the dwelling and septic system. Petition at 7.

Mr. Gazza submitted an application to the state to construct his home. Appendix at 26a. The state denied his

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[7] 480 U.S. 470 (1987).

[8] 481 U.S. 704 (1987).

[9] 482 U.S. 304 (1987).

[10] 505 U.S. 1003 (1992).

[11] 512 U.S. __, 114 S. Ct. 2309 (1994).

[12] __ U.S. __, 117 S. Ct. 29 (1997).

application, instead enforcing the setback requirements that precluded Mr. Gazza from using his land for its zoned purpose. Appendix at 27a. The state indicated that it would permit only a dock, catwalk, and small parking lot on his land. Appendix at 28a. However, the state's suggestion was entirely inconsistent with uses of other lots in this exclusively residential neighborhood and prohibited Mr. Gazza from making any reasonable economically beneficial use of his land. Petition at 7, 9.

Mr. Gazza claimed that the denial of his application constituted a taking of his property.[13] Appendix at 45a. Each of the New York courts before which Mr. Gazza's claim was heard denied him any relief. The trial court observed that because he knew at the time he purchased his property that there were limitations on its use, he did not own an interest in the property which could be "taken" by the denial of the setback variances. Appendix at 49a-50a. The appellate court affirmed on the same grounds, noting that "central to this appeal is the fact that at the time he purchased the property, the petitioner knew of the ... regulations that 'burdened' it." Appendix at 37a. Ultimately, the New York Court of Appeals held that all existing land use regulations formed part of Mr. Gazza's title to his land, limiting the interests upon which he could base any claim. Appendix at 11a, 14a.

REASONS FOR GRANTING THE WRIT

SUMMARY

The New York Court of Appeals ruled that Mr. Gazza has no right to claim a deprivation of all reasonable economic

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[13] The Fifth Amendment's Takings Clause is applicable to state and local government via the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235-37 (1897).

use of his property for which he is entitled to any remedy because he never owned the right to develop his land having acquired it after land use regulations were enacted. The New York court has thereby determined that one of the most essential of all property rights–the right to use it–may be transferred to the state without compensation by legislative enactment.

On the same day the Court of Appeals decided Mr. Gazza's case, New York's highest tribunal also decided three other cases on identical grounds.[14] Together these decisions establish what amounts to a judicial doctrine that property rights can be transferred to the state without compensation by legislative *fiat*.[15]

The New York court's doctrine is antithetical to deeply rooted understandings of the relationships that define

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[14] *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, *supra*, *Basile v. Town of Southampton*, 89 N.Y.2d 974, 655 N.Y.S.2d 877, 678 N.E.2d 489 (1997), *appeal docketed*, No. 96-1852 (May 27, 1997), and *Kim v. City of New York*, *supra*. A single *per se* rule articulated by the New York court was applied to each of these cases, resulting in the owners being denied the ability to make economically beneficial use of their property or being forced to suffer a physical occupation without receiving just compensation.

[15] Less than one week after the Court of Appeals crafted its doctrine, lower courts began applying and extending it. In *Brotherton v. Department of Environmental Conservation of the State of New York*, No. 12809-90 (Feb. 24, 1997), a Suffolk County court held that an owner who was precluded from making any economically viable use of his land had no property interest subject to protection under the Takings Clause because restrictive regulations were adopted prior to the property's transfer from a wholly owned corporation to the firm's sole shareholder. *The sole legal ground for this decision was the Court of Appeals' doctrine which is the subject of the present petition.*

property.[16] The New York court's treatment of these understandings is contrary to those of at least four other states' courts–Florida, Massachusetts, New Jersey, and Michigan–which have demonstrated a respect for the principles upon which our takings jurisprudence has been based.[17] The doctrine undermines acknowledged fundamental principles of property law.[18] The doctrine leaves a government unconstrained to redefine property interests without regard for constitutional limits.[19] The doctrine renders the Takings Clause of the Fifth Amendment to the United States Constitution a nullity.

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[16] *See Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (property consists of recognized expectancies).

[17] *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (5th Dist. Fla.), *review denied*, 613 So. 2d 3 (Fla. 1992) (a property owner entitled to compensation under Fifth Amendment where permit request to build home in residentially zoned land denied, based on the property's status as a wetlands); *Lopes v. City of Peabody*, 595 N.E.2d 812 (Mass. 1992), *review denied*, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated*, __ U.S. __, 113 S. Ct. 1574 (1993), *on remand*, 629 N.E.2d 1312, 1314-15 (1994) (purchaser of land subject to land use restriction at the time of purchase, has every right to challenge the continued application of the restriction); *K&K Construction, Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (Mich. 1996), *leave to appeal granted*, No. 106712 (Mich. Sup. Ct. Apr. 28, 1997) (timing of a regulation and acquisition of property cannot act to preclude just compensation where it would otherwise be due); *Moroney v. Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045, 1048 (N.J. 1993), *cert. denied*, 642 A.2d 1004 (1994) (property owners "stand in the shoes of their predecessors in title" to challenge local zoning ordinance).

[18] *See* 2 James Kent, *Commentaries on American Law* *339 (1826) (Compensation when property is taken "is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law").

[19] *See Lucas*, 505 U.S. at 1003, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (warning that such powers to redefine property must be constrained by constitutional limitations. Otherwise, the tendency would be to increasingly qualify uses of private property until none remained.)

It is imperative that this Court grant certiorari to reconcile the conflicts created by this New York decision and restore fundamental rights eliminated by the New York doctrine.

I
PROPERTY CONSISTS OF FUNDAMENTAL RELATIONSHIPS WHICH ARE PROTECTED UNDER THE CONSTITUTION'S FIFTH AMENDMENT

This Court has never delineated the precise contours of the term *property*, relying instead on "existing rules or understandings" stemming from sources independent of the Constitution "to define the range of interests that qualify for protection as 'property.'"[20]

As used in the Taking Clause, *property* includes the entire "group of rights inhering in the citizen's [ownership]."[21] The term denotes "the right to possess, use and dispose of [property]. ... The constitutional provision is addressed to every sort of interest the citizen may possess."[22]

The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement.[23] These claims for

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[20] *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1030 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

[21] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 n.6 (1980), (quoting *United States v. General Motors Corp.*, 323 U.S. 373 (1945)).

[22] *PruneYard*, 447 U.S. at 83 n.6 (quoting *United States v. General Motors* Corp., 323 U.S. at 377-78; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[23] *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (property involves mutually explicit understandings); *Nixon v. United States*, 978 F.2d 1269, 1275-76 (DC Cir. 1992) (citing *Kaiser Aetna v. United States*, 444 U.S.

(continued...)

which the owners were entitled to protection have attached to a wide variety of things[24] and varying degrees of possessory interests.[25]

This Court has identified some of the legal relationships or rights qualifying for protection under the Fifth Amendment.[26] One of the most essential of these is the right to

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[23] (...continued)
at 179 (property consists of recognized expectancies)); *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988) (property is an expectation based on rules or understandings).

[24] *See Florida Rock Industries v. United States*, 18 F. 3d 1560 (Fed. Cir. 1994).

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. ... There are specially structured property interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts).

Id. at 1570.

See also K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 185-86 (1988) (trademark law confers constitutionally protected private *property* interests).

[25] *See, e.g., United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 638 (1961) (Douglas, J., concurring) (owners of an easement and subservient fee have parts of the bundle of rights that represent "property" within the meaning of the Fifth Amendment.); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (owners of reversionary interest in easement entitled to just compensation when government took interest).

See also 1 Edward Coke, *Institutes* ch. 1, § 1 (1st Amer. ed. 1812). "For what is the land but the profits thereof[?]"

[26] That there are more than one set of relationships or rights does not lead to the implication that one is necessarily superior to another. The government may not coerce a property owner to surrender one right for another. *Cf. Dolan*, 114 S. Ct. at 2317 (government may not require a person to give up constitutional right in exchange for a discretionary benefit).

exclude others.[27] In *Hodel v. Irving*,[28] this Court described the right to pass on property to one's heirs as one which "has been part of the Anglo-American legal system since feudal times."[29] Another fundamental protected element of ownership is the ability to make productive use of property.[30] Collectively, these rights constitute *property* entitled to protection under the Fifth Amendment.

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership.[31] If this recognition is denied, then the ability to use property is no more than a government privilege or entitlement. Property ownership without the right of use would be an empty formalism, incapable of performing its crucial social function of providing a bulwark of personal

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[27] *PruneYard*, 447 U.S. at 82 (citing *Kaiser Aetna*, 444 U.S. at 176). In *Loretto*, this Court observed that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto* at 427 (citing *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1872)).

[28] 481 U.S. 704.

[29] *Hodel*, 481 U.S. at 716.

[30] *Lucas*, 505 U.S. at 1027-30 (deprivation of all economically beneficial use of land *per se* taking). *See also First English*, 482 U.S. at 318 (Constitution requires compensation when landowner denied all use of property, even temporarily).

[31] *See Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's property ... cannot remotely be described as a 'governmental benefit.'"). *See also* Robert Nozick, *Anarchy, State, and Utopia* 171 (1974) ("[t]he central core of the notion of a property right in X ... is the right to determine what shall be done with X"); *United States v. Causby*, 328 U.S. 256, 261 (1946).

autonomy against the encroachments of an aggressive, overreaching state.[32]

Enforcement of the Fifth Amendment's Takings Clause signals a commitment to private property as a bulwark for the protection of individual rights.[33]

> [T]he only dependable foundation of personal liberty is the personal economic security of private property ... There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it ... [is] the very essence of the free man's way of life.[34]

When the New York court held that all existing land use regulations formed part of Mr. Gazza's title to his land, limiting the interests upon which he could base any claim, the court redefined *property*, thereby undermining mutually reinforcing understandings that are *property's* essential character. The court turned its back on individual rights guaranteed by the Constitution of the United States, undermining principles of private property without which no one can truly be free.

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[32] *See* Friedrich A. Hayek, *The Road to Serfdom*, 103-04 (1944) (system of private property rights assures "that nobody has complete power over us, that we as individuals can decide what to do with ourselves").

[33] *Loveladies Harbor, Inc. v. United States*, 28 F. 3d 1171, 1175 (Fed. Cir. 1994).

[34] Walter Lippmann, *The Method of Freedom* 100-02 (1934), *quoted in Loveladies Harbor*, 28 F. 3d at 1175 n.8.

II
PROPERTY IS DEFINED WHEN FUNDAMENTAL RELATIONSHIPS ARE ESTABLISHED AND NOT EACH TIME PROPERTY IS TRANSFERRED

Recently, this Court observed that "[i]ndividual freedom finds tangible expression in property rights."[35] However if property rights are to have any meaning, the power of the state to alter the definition of *property* must have certain constitutional limits.

In *Lucas*, this Court observed that some land use regulations would trigger the Fifth Amendment's requirement of just compensation unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the] title to begin with."[36]

Property is defined when the relationships between specific people and the things they own are first recognized by law. However, the New York court's doctrine focuses on every transfer, defining and redefining each successive owner's title by the matrix of all then-existing laws. This interpretation of *Lucas'* "antecedent inquiry" reaches an illogical result, inconsistent with long-standing principles of property law as well as the holdings of this Court and the Court of Appeals for the Federal Circuit.

It is axiomatic that when property is transferred without any interests being retained by the prior owner, the new owner stands in the shoes of the predecessor in interest.[37] With each

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[35] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

[36] *Lucas*, 505 U.S. at 1027.

[37] *See Moroney*, 633 A.2d at 1048 (property owners "stand in the shoes of their predecessors in title" to challenge local zoning ordinance).

such transfer, nothing in the bundle of protected property interests is lost or gained. The composition of the legal relationships remains unchanged as the owners of land are substituted, the new owner for the prior owner.[38]

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[38] Were it otherwise, only the owner at the time a regulation is passed could sue for a taking caused by a particular regulation. But such claims would invariably not be ripe at the time a regulation is passed unless the owner were to make an application. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (plaintiff must demonstrate that final decision received regarding application of challenged regulations to the property at issue from the government entity charged with implementing the regulations).

Certainly the mere passage of a regulation affecting wetlands does not constitute a taking. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court

> made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Riverside Bayview Homes, 474 U.S. at 126-27 (citations omitted).

Furthermore, any facial challenge would be problematic. This Court recently observed that

> a sound judgment about what use will be allowed simply cannot be made by asking whether a parcel's characteristics or a proposal's details facially conforms to the terms of the general use regulations.

Suitum, slip op. at 12. To the extent that the holding in this case insists that an owner must file a premature takings claim lest the government acquire part of the property upon its sale, such an insistence conflicts with the

(continued...)

By the doctrine crafted by the New York Court of Appeals in this case, every land use restriction alters the title at the instant land is transferred from one owner to another. The court implies the state has the absolute right to sit on the sidelines, exacting an interest in property for which it pays nothing whenever private parties transfer their title to other private parties. The court's theory is hardly new; indeed its doctrine does little more than encourage relationships which were rejected in England more than 100 years before the ratification of this nation's Constitution.

In feudal England, all property was owned by the crown. Land ownership was *tenurial*, the "owner" holding land subject to the granting of continued possession by the king. Individuals took title in land "of the king;" the king was the ultimate owner of all land–all others held only inferior possessory interests. This system of land ownership came to an end in 1660.[39]

In *Lucas*, this Court noted that the government could prohibit uses of land without implicating the constitutional requirement to pay just compensation[40] only if "the use of these

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[38] (...continued)
rationale behind this Court's well-established doctrine of ripeness in the context of regulatory takings.

[39] Thomas Bergin & Paul Hasskell, *Preface to Estates in Land and Future Interests*, ch. 1, §§ 2-11 (1984).

[40] *Lucas*, 505 U.S. at 1029.

> On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Id.

properties for what are now expressly prohibited purposes was *always* unlawful."[41] The land use restrictions that would meet *Lucas'* test of constitutionality would not create new limitations on existing titles but would instead merely recognize historically prohibited uses.[42] The restrictions would do no more than state that which the owners were never free to do with their land.

What *Lucas* implied, the Court of Appeals for the Federal Circuit has stated expressly. In *Preseault v. United States*, the Federal Circuit held that property owners could challenge a land conversion even though the law under which the land was converted was enacted before the property owners acquired their property.[43]

Under reasoning strikingly similar to that of the lower court in this case, the United States argued that the Preseaults' property interests in the tract were not defined when the railroad acquired its rights-of-way in 1899, but by the evolving enactment and implementation of law between 1899 and the dates the Preseaults acquired the land.[44]

The Federal Circuit Court of Appeals categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation."[45] Rather, the rights were defined by the original conveyances and remained unchanged notwithstanding

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[41] *Id.* at 1030 (emphasis added).

[42] *Id.*

[43] *Preseault*, 100 F. 3d at 1530-31.

[44] *Id.* at 1537.

[45] *Id.* at 1530.

subsequent regulatory enactments.[46] Specifically, the federal court stated that

> [t]he question of what estates in property were created by these turn-of-the-century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and statutes of Vermont *then in effect*.[47]

For hundreds of years, property owners in New York bought and sold land, in each instance transferring to the new owners all of the bundle of rights previously enjoyed by the old owners. When Mr. Gazza purchased his land, he should have acquired the very same protectable interests enjoyed by his predecessors in interest but the court below declared that he did not.

The New York court's doctrine does more than upset this historically rooted understanding of property rights. The court's doctrine precludes Mr. Gazza from challenging the regulations as applied to his property. There is nothing to stop the state from applying land use restrictions to private property, peeling away rights each time the land is transferred until nothing is left. Under the court's holding, it is plausible that eventually every landowner in New York will own no interest which has not been or is not eventually taken by the state. Under the court's doctrine, successors in interest will eventually be left with little more than tenancies on the state's land.

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[46] *Id.* at 1537.

[47] *Id.* at 1534

III
THE ESTABLISHING OF PROPERTY RELATIONSHIPS CREATES EXPECTANCIES THAT THE GOVERNMENT CANNOT EXTINGUISH WITHOUT TRIGGERING FIFTH AMENDMENT LIABILITY

Property–like its companion terms in the Fifth Amendment, *life* and *liberty*–does not derive its meaning solely from provisions of positive law. Rather, it has a "normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."[48] On numerous occasions, this Court has stated that the government does not have unlimited power "by *ipse dixit* [to] transform private property into public property without compensation."[49]

Even though as a general matter the Constitution leaves the law of real property to the states,[50] a state may not destroy expectations based on long-established relationships between people and things, "defeat[ing] the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[51]

One of the reasons for this rule is to prevent the government, under the rationale of adjusting the benefits and burdens of economic life, from "forcing some people alone to

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[48] *PruneYard*, 447 U.S. at 93-94 (Marshall, J., concurring).

[49] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Loretto*, 458 U.S. at 439.

[50] *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332, 1334 (1994).

[51] *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring).

bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[52]

In *Webb's Fabulous Pharmacies*, this Court held that expectations based on the "usual and general rule," that deposited fund interest belongs to the owners of the principal, could not be frustrated, whether by statute or judicial decree, merely by declaring that the moneys were *public* and not *private*.[53]

Similar to the expectations based on established relationships between people and the things they own are those expectations based on the vitality of the Fifth Amendment–"historically rooted expectation[s] of compensation" when private property is taken for public use.[54]

To build a home on his property, Mr. Gazza required nothing more than a variance from a set-back requirement, one of the most common forms of land use applications routinely considered by regulatory agencies. This court has considered variances of significantly greater magnitude to be sufficiently likely to be approved that such applications are required before a final determination can be made on the allowed use of the property.[55]

Nonetheless, the New York Court of Appeals told Mr. Gazza that he never possessed the right to build a home on his land because this use might have been prohibited under the land use restrictions which were adopted before he acquired his title. The court decreed that Mr. Gazza is entitled neither to use

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[52] *Webb's Fabulous Pharmacies*, 449 U.S. at 163 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

[53] *Webb's Fabulous Pharmacies*, 449 U.S. at 162-64

[54] *Loretto*, 458 U.S. at 441.

[55] *See, e.g., Williamson County*, 473 U.S. at 187-88 (claim premature where land owner had not set sought variances).

his land for its intended and zoned purpose nor to just compensation for the loss of all beneficial use because the regulations which authorized the denial of his application had the practical effect of a dedication of his residential lot for a public purpose–essentially undevelopable open space.

Under the New York court's holding, the state is free to impose new burdens on owners of private property, ignoring expectations based on long existing understandings of the relationships between people and things and expectations based on the Fifth Amendment to the United States Constitution. Under the court's holding, the state is free by *ipse dixit* to transform private property into public property without compensation–exactly as it has done in this case.

CONCLUSION

The New York court's doctrine deprives individuals of fundamental constitutional rights by undermining the essential character of property. The court repudiates its commitment to protect individual rights guaranteed by the Constitution of the United States. The court permits the state to convert private property into public property without compensation. Only this Court can resolve the conflicts created by the New York court concerning important questions of federal constitutional law.

Only this Court can undo the damage done to important constitutional rights. For the reasons stated above this petition for writ of certiorari should be GRANTED.

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